

APR 11 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Computer III Remand Proceeding)	CC Docket No. 90-623
)	
Application of Open Network)	CC Docket No. 92-256
Architecture and Nondiscrimination)	
Safeguards to GTE Corporation)	

COMMENTS OF THE
NORTH AMERICAN TELECOMMUNICATIONS ASSOCIATION

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TABLE OF CONTENTS

STATEMENT OF INTEREST	1
SUMMARY	2
BACKGROUND	3
I. THE COMMISSION SHOULD PROHIBIT THE BOCs AND GTE FROM PROVIDING THEIR CPE OPERATIONS DISCRIMINATORY ACCESS TO CPNI	6
II. THE COMMISSION SHOULD APPLY THE SAME CPNI RULES TO CPE AS CURRENTLY APPLY TO ENHANCED SERVICES	10
CONCLUSION	12

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NORTH AMERICAN TELECOMMUNICATIONS ASSOCIATION

The North American Telecommunications Association ("NATA") submits the following comments in response to the Commission's Public Notice seeking additional comments on rules governing telephone companies' use of customer proprietary network information ("CPNI"), FCC 94-63, released March 10, 1994. NATA's comments respond to the Commission's request for comments as to "whether any changes in [the Commission's] rules are required to achieve the best balance between customer's privacy interests, competitive equity, and efficiency" regarding the Bell Operating Companies' ("BOCs") and GTE's access to CPNI for marketing customer premises equipment ("CPE"). Public Notice, supra, at 1.

STATEMENT OF INTEREST

NATA is a trade association representing manufacturers, suppliers, distributors and retailers of CPE and related business telecommunications services. Founded in 1970, NATA exists to promote competitive markets and healthy sales, and support channels for users of business and public communications products and services. NATA has actively participated in FCC proceedings affecting CPE markets. NATA supports regulatory policies that

promote high quality equipment and service offerings and that ensure fair competition in the telecommunications equipment and services distribution marketplace. In a prior proceeding NATA requested that the Commission equalize the treatment of CPE and enhanced services in relation to those nonstructural safeguards such as the CPNI rules. See NATA's Petition to Expand the Scope of Rulemaking, In the Matter of Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket No. 92-256 (filed December 29, 1992).

SUMMARY

The Commission should take this opportunity to end the BOCs' and GTE's discriminatory access to CPNI in the CPE market. The Commission has consistently required these carriers to maintain nondiscriminatory policies in the provision and maintenance of network functions supporting unregulated products and services. Allowing the BOCs' and GTE's CPE marketing personnel unfettered access to CPNI while prohibiting independent CPE vendors' access to the same information is contrary to the Commission's nondiscrimination policies and represents an illegal cross-subsidy of carriers' unregulated services by their regulated services.

The Commission should equalize access to CPNI. Such equality can be achieved in either of two ways. First, the Commission could require prior customer authorization before CPNI is disclosed to either the carriers' CPE operations or independent vendors of CPE. In the alternative, both the carriers' CPE operations and their CPE

competitors could be allowed access to CPNI unless the customer requests that the information be withheld.

At a minimum, the Commission should extend the CPNI safeguards accorded independent providers of enhanced services to CPE providers. The Commission historically has applied consistent regulatory treatment to carrier provision of CPE and of enhanced services. Currently, however, the FCC's rules require prior authorization before the BOCs' or GTE's enhanced service operations can access CPNI of customers with more than 20 business lines. There is no rational basis for the difference in treatment of CPNI for use by the BOCs' or GTE's CPE operations as opposed to their enhanced services operations. In fact, the disparity in treatment of enhanced services as opposed to CPE has evolved as something of an aberration. Even if the Commission does not strengthen the CPNI rule for enhanced service providers, the Commission must still act to include CPE vendors within the protection of the CPNI rule that currently applies to enhanced services. If the rule is strengthened for enhanced services, that strengthened rule also should apply to CPE.

BACKGROUND

CPNI is information about a customer's use of network services that a telephone company possesses because the company provides those network services. Unequal access to CPNI gives the BOCs and GTE an unwarranted advantage over independent providers of CPE in marketing CPE to customers.

Since the initial Computer II ruling,¹ the Commission has recognized that discriminatory access to CPNI gives the BOCs a significant competitive advantage over independent CPE providers. Initially the Commission determined that CPE, when provided by the BOCs, should be provided through a separate subsidiary.² Subsequently, in 1984, the Commission determined that the Computer II separate subsidiary requirement should continue to apply to the divested BOCs.³ In these decisions, the Commission adopted a rule prohibiting the BOCs from providing CPNI to their CPE subsidiaries unless that information was also made available to competing CPE suppliers on the same terms and conditions.⁴

Later, the Commission removed the separate subsidiary requirement and also removed the requirement for nondiscriminatory access to CPNI.⁵ Currently, the BOCs' CPE marketing personnel are

¹ Amendment of Section 64.702 of the Commission's Rules and Regulations, ("Second Computer Inquiry"), Final Decision, 77 FCC 2d 384 ("Computer II Final Decision"), recon., 84 FCC 2d 50 (1980) ("Computer II Reconsideration"), further recon., 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983), second further recon., FCC 84-190 (released May 4, 1984).

² Computer II Final Decision, 77 FCC 2d at 466-70.

³ Policy and Rules concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 FCC 2d 1117 (1984), aff'd sub nom. Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (7th Cir. 1984), recon., FCC 84-252, 49 Fed. Reg. 26056 (1984), aff'd sub nom. North American Telecommunications Association v. FCC, 722 F.2d 1282 (7th Cir. 1985).

⁴ 47 CFR § 64.702(d)(3).

⁵ CPE Safeguards Order, 2 FCC Rcd at 153.

not required to gain prior authorization before gaining access to the CPNI of any customers. Independent marketers of CPE, however, must obtain advance authorization from the customer in order to obtain access to CPNI.

Until recently, the Commission applied the same CPNI rules to both CPE and enhanced services. In the 1991 Computer III remand proceedings,⁶ however, the Commission recognized the inequity of its CPNI rules in the context of enhanced services. The Commission decided to strengthen those rules for certain customers. Under the strengthened CPNI rules, BOC personnel involved in marketing enhanced services must obtain written authorization from customers with more than twenty lines before the BOCs were permitted access to that customer's CPNI. The Commission recently decided to apply the same rule to GTE's enhanced service operations. The Computer III remand and GTE proceedings, however, addressed only nonstructural requirements for enhanced services and not for CPE.⁷ The Commission has not acted to eliminate, even in part, the inequity of its rules regarding CPE vendors' access to CPNI.

⁶ Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991).

⁷ The Computer III remand proceedings were the result of a Ninth Circuit decision vacating Commission rules regulating BOC provision of enhanced services. The Commission's rules regarding provision of CPE were, not, however, a part of the appeal. Thus, the Computer III remand proceedings did not deal with the CPNI rules relating to the provision of CPE.

I. THE COMMISSION SHOULD PROHIBIT THE BOCs AND GTE FROM PROVIDING THEIR CPE OPERATIONS DISCRIMINATORY ACCESS TO CPNI.

The BOCs and GTE are currently permitted to practice blatant discrimination between their own and other companies' CPE operations in providing access to CPNI. BOC and GTE personnel who engage in unregulated CPE marketing are permitted unfettered access to CPNI of customers of regulated services, while independent CPE vendors are required to obtain written authorization before they may have access to the same information. This CPNI rule is inconsistent with established Commission policy, which prohibits carriers from using their market power in regulated exchange services to discriminate against other vendors' products and services. Discriminatory access to CPNI creates the potential for abuses which the Commission consistently has sought to prevent, i.e., "the monopoly network facility provider's use of monopoly-derived revenues and its monopoly position to gain unfair leverage in unregulated marketplaces."⁸

Access to CPNI provides important information regarding customers' use of network services. CPNI enables a CPE vendor, for example, to generate lists of customers who use particular network features such as DID or call forwarding, or customers who subscribe to specialized services such as data services or off-premises extensions, and to evaluate customers' traffic data to determine whether they are likely prospects for various kinds of CPE. With their privileged access to CPNI, the BOCs' and GTE CPE marketing

⁸ 95 FCC 2d at 1142.

personnel can target their advertising and sales forces more efficiently than independent CPE vendors who lack the same access to CPNI. The CPNI policy thus gives the BOCs and GTE an unwarranted competitive advantage in marketing CPE within their service territories.

Since the Computer II decision, the Commission has focused its efforts on ensuring that the BOCs and their competitors compete under the same terms and conditions, and without cross-subsidies between the regulated and unregulated sectors of the BOCs' operations. Even after the Commission determined that the maintenance of separate subsidiaries was no longer necessary to maintain a competitive marketplace, the Commission steadfastly maintained that the BOCs would not be allowed to discriminate against their competitors in installation and maintenance of network access lines, or engage in discriminatory pricing of network services.⁹

There is no material difference between discrimination in access to CPNI and other forms of discrimination which the Commission has ruled unlawful. CPNI is a product of the BOCs' regulated monopoly functions. The BOCs' and GTE's discrimination in access to CPNI is therefore no different from unlawful discrimination in the provision of any regulated monopoly service.

Further, the Commission has recognized that it is an abuse of the BOCs' position as basic service providers to engage in

⁹ CPE Safeguards Order, 2 FCC Rcd at 155. The Commission specifically noted that discrimination in installation and maintenance would violate Section 202 of the Communications Act.

"unhooking," or the targeting of sales pitches at customers who contact the BOC to order network services to use with a competitor's unregulated service.¹⁰ The Commission's discriminatory CPNI disclosure rule, however, is an open invitation to engage in such practices. Targeting competitors' customers who order basic services is no less objectionable when it occurs as a result of privileged access to CPNI than when it takes the form of an immediate marketing attempt by the basic service order-taking personnel. In both cases, the carrier is using its position as a monopoly basic service provider to interfere with its competitors in the provision of an unregulated service.

The current rule regarding provision of CPNI also functions as a cross-subsidy of the BOCs' and GTE's unregulated operations. CPNI is a valuable asset. Those with access to it are able to save substantial resources that must be invested in market research by their competitors. The BOCs' and GTE's regulated network services operations, however, currently provide CPNI to their unregulated CPE operations free of charge, while refusing to provide the same asset to a competitor at any price. Thus, in providing discriminatory access to CPNI, the BOCs and GTE are wasting a valuable asset and subsidizing the unregulated operations of the company.

There is no reasonable basis for allowing BOC or GTE CPE marketing personnel access to CPNI information without the customer's authorization while denying similar access to such

¹⁰ Computer III Remand Proceedings, 6 FCC Rcd at 7613.

information by other CPE providers. Access to CPNI yields important marketing information to CPE providers that would enable CPE providers to more efficiently market their services. Unequal access to this information puts independent providers at a serious and unwarranted disadvantage and exposes them to competitive injury. Therefore, if such information is available to BOCs' and GTE's CPE marketing personnel, it must be equally available to other CPE providers. To the extent that there are privacy concerns regarding CPE providers' access to this information, those concerns can be addressed by requiring CPE providers to enter commercially reasonable non-disclosure agreements.

Conversely, if the information is deemed sensitive enough from a privacy standpoint that the information must be withheld from independent CPE marketing personnel, then the same considerations would dictate that the information must be withheld from BOC- or GTE-affiliated CPE marketing personnel. CPNI access does not raise significant privacy concerns only when the disclosures is made to parties unaffiliated with the telephone company. The information will be put to the same use whether the information is accessed by the carrier's own CPE vendors or independent CPE vendors. If such use of CPNI by a carrier's CPE personnel does not violate users' privacy expectations, then the same is true of similar use of CPNI by independent CPE providers. Any concerns about further use or disclosure of CPNI for other purposes can be addressed by means of non-disclosure agreements.

The Commission cannot maintain the current policy regarding discriminatory access to CPNI without violating the principles of Computer II and its progeny. Therefore, the Commission should either (1) require prior authorization before either carrier-affiliated or independent CPE vendors have access to CPNI; or (2) allow equal access to CPNI for both the BOCs (or GTE) and independent vendors without prior authorization.

II. THE COMMISSION SHOULD APPLY THE SAME CPNI RULES TO CPE AS CURRENTLY APPLY TO ENHANCED SERVICES.

The Commission should apply the same CPNI rules to the BOCs' and GTE's marketing of CPE as to these carriers' marketing of enhanced services. As discussed above, the Commission has historically applied consistent regulatory treatment to carrier provision of CPE and of enhanced services. From the original 1980 Computer II until the 1991 Computer III remand proceedings, the Commission has maintained consistency in its regulation of the CPE and enhanced service offerings of carriers. The Commission has recognized that similar considerations apply to its regulation of CPE and enhanced services markets, and has applied identical or closely similar rules to carriers' participation in these two market sectors.

This is particularly true of CPNI. The competitive value of CPNI is comparable for CPE and for enhanced services, and the privacy and efficiency concerns are also similar. Indeed, the BOCs and GTE often use the same marketing personnel for CPE and enhanced

services, and the application of different CPNI rules introduces unnecessary complexity into compliance procedures.

The current disparity in the application of CPNI rules to enhanced services as opposed to CPE has evolved as something of an aberration. The difference in treatment between CPE and enhanced services resulted because the Computer III remand proceedings concerned only the BOCs' provision of enhanced services and not their involvement in the CPE market.

In the Computer III remand proceedings, the Commission determined that the advantage created by access to CPNI is of particular importance with respect to large business customers. The Commission concluded that for these customers, CPNI is most likely to be of competitive value, due to the volume and nature of business involved. The Commission also determined that a prior authorization requirement for accessing CPNI of these customers would not cause significant inconvenience to the BOCs' unregulated marketing personnel because those marketing personnel are likely to have pre-established sales relationships with large business customers. To the extent that these points are valid, the same rationale should apply to the marketing of CPE. Therefore, there is no rational basis for the current disparity in the application of CPNI rules to CPE and to enhanced services.

Thus, if the Commission is not persuaded to completely eliminate the discriminatory policies regarding access to CPNI by BOCs' and GTE's marketing personnel and independent CPE marketing personnel, the Commission should at least apply to these carriers'

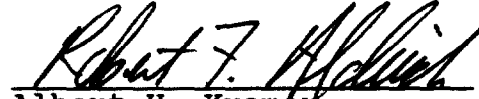
CPE operations the same prior authorization requirement that is currently applicable to these carriers' marketing of enhanced services. Even if the Commission does not strengthen the CPNI rule for enhanced service providers, the Commission must still act to include CPE vendors within the protection of the existing rule for enhanced services. If the rule is strengthened for enhanced services, that strengthened rule should apply to CPE.

CONCLUSION

The current rules regarding the BOCs' and GTE's provision of CPNI to their CPE operations and to their competitors in the CPE market discriminate against independent providers of CPE. The Commission should equalize the conditions under which carriers and independent vendors of CPE compete in an unregulated market. The Commission should equalize access to CPNI by either (1) requiring prior customer authorization before CPNI is given either to the BOCs' (or GTE's) CPE operations or to independent vendors of CPE; or (2) allowing both the BOCs (or GTE) and their competitors access to CPNI unless the customer requests that the information be withheld. At a minimum, however, the Commission should extend to independent CPE providers the same protection granted to providers

of enhanced services. If the rule is strengthened for enhanced services, that strengthened rule should apply to CPE.

Respectfully submitted,



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April 11, 1994

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of April, 1994, I caused a true copy of the Comments of the North American Telecommunications Association to be served upon the parties listed below.

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